

STATE OF MICHIGAN
COURT OF APPEALS

EDWARD BANGS II,

Plaintiff-Appellee,

v

SARA MAY GROULX,

Defendant-Appellant.

UNPUBLISHED

October 22, 2013

No. 314566

Genesee Circuit Court

Family Division

LC No. 08-285186-DP

Before: MURPHY, C.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order granting plaintiff's motion to change custody with respect to the parties' minor child. We reverse and remand for a determination by the trial court whether there existed proper cause or a change of circumstances, as necessary to modify the previous custody award.

In May 2010, a consent judgment was entered pursuant to which the parties were awarded joint legal and physical custody of their minor child. In July 2012, plaintiff filed a motion to modify custody, requesting sole or primary physical custody. In the motion, plaintiff set forth a litany of allegations that he claimed constituted proper cause or reflected a change of circumstances, thereby permitting the trial court to revisit the consent judgment relative to custody. In her response to the motion, defendant denied all of those allegations. The trial court conducted a five-day evidentiary hearing on the motion. On the first day before testimony was taken, defendant asserted that plaintiff had not satisfied the threshold of showing proper cause or a change of circumstances. The trial court indicated that if defendant wished to file a written motion on the matter, the court would consider it at the end of plaintiff's proofs. Defendant never filed a motion regarding proper cause or a change of circumstances, nor did she ever raise or even mention the issue again, including in her closing argument and in a motion for reconsideration. The trial court ultimately found that there was a joint established custodial environment with both parties and that there was clear and convincing evidence, upon examination of the best-interest factors, to modify physical custody and award sole custody to plaintiff. See MCL 722.23 (best-interest factors); MCL 722.27(1)(c) (established custodial environment cannot be changed absent "clear and convincing evidence" that the change "is in the best interest of the child"). The trial court never expressly ruled on whether proper cause was

shown or whether there had been a change of circumstances justifying modification of the previous custody judgment.

On appeal, defendant argues that the trial court erred by modifying the joint physical custody arrangement without determining whether there existed proper cause or a change of circumstances. In the alternative, defendant maintains that, assuming the trial court implicitly found proper cause or a change of circumstances in light of the fact that it modified the previous custody judgment, the finding constituted error. Plaintiff contends that defendant effectively waived her appellate arguments, or at least forfeited them, by never revisiting the issue of proper cause or change of circumstances after the court directed her to file a motion on the issue. Plaintiff also argues that the trial court implicitly found proper cause or a change of circumstances and the finding did not constitute error.

With respect to child custody disputes, “all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.” MCL 722.28. MCL 722.27 provides in relevant part:

(1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:

...

(c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances[.]

The seminal case on the threshold inquiry of whether there existed proper cause or a change of circumstances for purposes of modifying a custody order is of course *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003). In construing MCL 722.27(1)(c), the *Vodvarka* panel stated that the party seeking a change in custody must establish, by a preponderance of the evidence, either proper cause or a change of circumstances, and if the movant fails to so establish, “the court is precluded from holding a child custody hearing.” *Vodvarka*, 259 Mich App at 508-509; see also *In re Anjoski*, 283 Mich App 41, 53; 770 NW2d 1 (2009).¹ Absent satisfaction of the burden to show proper cause or a change of circumstances, a trial court is not authorized under the statute to revisit a valid prior custody decision and to engage in reconsideration of the statutory best-interest factors. *Vodvarka*, 259 Mich App at 508-509. The purpose of requiring proper cause or a change of circumstances, as well as requiring

¹ The *Vodvarka* panel subsequently reiterated that “[t]he movant . . . has the burden of proving by a preponderance of the evidence that either proper cause or a change of circumstances exists *before* the trial court can consider whether an established custodial environment exists (thus establishing the burden of proof) and conduct a review of the best interest factors.” *Vodvarka*, 259 Mich App at 509.

clear and convincing evidence to change an established custodial environment, is to erect a barrier against removing a child from an established custodial environment except in compelling cases. *Id.* at 509; *Anjoski*, 283 Mich App at 53.

We also note this Court's decision in *Mitchell v Mitchell*, 296 Mich App 513, 517-518; 823 NW2d 153 (2012), which provided some procedural clarity in regard to the hearing process:

Defendant first argues that the trial court did not establish proper cause or a change of circumstances in a separate proceeding before the hearing to modify custody. We disagree.

. . .

[T]he first step toward modifying a custody award is to show proper cause or a change of circumstances. But the determination of whether proper cause or a change of circumstances exists does not necessarily require an evidentiary hearing. . . . Only after a moving party has established proper cause or a change of circumstances may the trial court reevaluate the statutory best-interest factors.

In this case, the trial court expressly stated on the record its reasons for finding that the proper cause standard had been satisfied. Defendant argues that this determination should have been made before the hearing to modify custody[.] . . . This Court did not hold [in its earlier unpublished opinion] that a separate hearing had to be conducted before a custody decision may be revisited, nor is one necessarily required. *Vodvarka*, 259 Mich App at 512.² The trial court is merely required to preliminarily determine whether proper cause or a change of circumstances exists before reviewing the statutory best-interest factors with an eye to possibly modifying a prior custody order. [Citations omitted.]

Accordingly, there is no error in conducting a single evidentiary hearing that encompasses: whether there exists proper cause or a change of circumstances as needed to modify custody; a determination of the child's established custodial environment, bearing on the burden of proof; an examination of the statutory best-interest factors; and a ruling on the custody motion. *Mitchell* does indicate, however, that the issue concerning proper cause or a change of circumstances must be the first issue reviewed and resolved by the trial court.

² In *Vodvarka*, 259 Mich App at 512, this Court stated:

Although these [threshold] decisions will be based on the facts particular to each case, we do not suggest that an evidentiary hearing is necessary to resolve this initial question. Often times, the facts alleged to constitute proper cause or a change of circumstances will be undisputed, or the court can accept as true the facts allegedly comprising proper cause or a change of circumstances, and then decide if they are legally sufficient to satisfy the standard.

We initially find that the trial court committed clear legal error in directing defendant to file a motion on the threshold issue, given that the burden was on plaintiff as movant to prove that the threshold was met by a preponderance of the evidence and that in defendant's response to the motion regarding the issue, she had denied the pertinent allegations. There was no legal basis for the trial court to mandate the filing of a motion by defendant. However, albeit a mistaken direction on the trial court's part, the fact that defendant took no steps whatsoever after the court directed her to file a motion on the issue and that she never again even mentioned the matter clearly revealed that defendant was no longer challenging or disputing whether there was proper cause or a change of circumstances. In defendant's closing argument, she discussed the established custodial environment, the heightened burden of proof given that environment, and the application of the best-interest factors; she was absolutely silent as to proper cause or a change of circumstances. The same is true for plaintiff during his closing argument. Certainly, that was not lost on the trial court and likely explains why it did not render a ruling on the threshold issue, i.e., it was no longer at issue.

Regardless of whether defendant failed to preserve her appellate arguments or, even further, completely waived the arguments, we cannot affirm and reversal and remand is necessary. "In all actions involving dispute of a minor child's custody, *the court shall* declare the child's inherent rights and establish the rights and duties as to the child's *custody*, support, and parenting time in accordance with this act." MCL 722.24(1) (emphasis added). We hold that even if defendant had expressly agreed that there existed proper cause or a change of circumstances, the trial court was nevertheless required to address the issue at some level and make a ruling on the record. In *Harvey v Harvey*, 470 Mich 186, 191-193; 680 NW2d 835 (2004), our Supreme Court observed:

The Child Custody Act[, MCL 722.21 *et seq.*,] is a comprehensive statutory scheme for resolving custody disputes. With it, the Legislature sought to "promote the best interests and welfare of children." The act applies to all custody disputes and vests the circuit court with continuing jurisdiction.

The act makes clear that the best interests of the child control the resolution of a custody dispute between parents, as gauged by the factors set forth at MCL 722.23. MCL 722.25(1). It places an affirmative obligation on the circuit court to "declare the child's inherent rights and establish the rights and duties as to the child's custody, support, and parenting time in accordance with this act" whenever the court is required to adjudicate an action "involving dispute of a minor child's custody." Taken together, these statutory provisions impose on the trial court the duty to ensure that the resolution of any custody dispute is in the best interests of the child.

Thus, we affirm the Court of Appeals decision to remand this case to the circuit court for a hearing de novo, but not for the reason stated by the Court of Appeals. It is irrelevant that the parties did not have a "valid agreement for binding arbitration or an otherwise valid waiver of procedural requirements" The Child Custody Act *required* the circuit court to determine the best interests of the children before entering an order resolving the custody dispute.

Our holding should not be interpreted, where the parties have agreed to a custody arrangement, to require the court to conduct a hearing or otherwise engage in intensive fact-finding. Our requirement under such circumstances is that the court satisfy itself concerning the best interests of the children. When the court signs the order, it indicates that it has done so. A judge signs an order only after profound deliberation and in the exercise of the judge's traditional broad discretion.

However, the deference due parties' negotiated agreements does not diminish the court's obligation to examine the best interest factors and make the child's best interests paramount. Nothing in the Child Custody Act gives parents or any other party the power to exclude the legislatively mandated "best interests" factors from the court's deliberations once a custody dispute reaches the court. [Citations omitted.]

The same logic applies equally here, where MCL 722.27(1)(c), which is part of the Child Custody Act, unequivocally indicates that the court, and the court alone, can modify or amend previous child custody judgments or orders "for the best interests of the child," but only upon an initial finding of proper cause or a change of circumstances. As reflected in *Harvey*, even if the parties come to an agreement on a custody matter, it does not diminish the court's obligation to do what is in the best interests of a child and to at least "satisfy itself concerning the best interests of the child[.]" *Harvey*, 470 Mich at 193. The child's best interests are paramount, especially when a child faces a potential disruption of the established custodial environment. Defendant's forfeiture or waiver of the threshold issue did not relieve the trial court from considering and ruling on the issue.³ To be clear, we are holding that the determination of proper cause or a change of circumstances is a mandatory ruling that must expressly be made by the trial court whenever modification of a custody order is being contemplated, regardless of whether the parties raise the issue or even agree that proper cause or a change of circumstances exists.

On remand, the trial court is to rule on whether there was proper cause or a change of circumstances. The existing evidentiary record should be sufficient to make the determination, but the trial court is free to entertain additional proofs if the court deems it necessary. The *Vodvarka* decision provides an excellent discussion of what constitutes proper cause and a change of circumstances and should be utilized by the trial court. *Vodvarka*, 259 Mich App at 509-514. Should the trial court rule that the threshold burden was not satisfied, the court shall deny plaintiff's motion to change custody. Should the trial court rule otherwise, defendant, if desired, can pursue a new appeal relative to the threshold ruling.

³ The record does not support a conclusion that the trial court implicitly ruled on the threshold issue; rather, it is evident that the court simply skipped over the issue due to the failure of the parties to address it. Moreover, MCR 3.210(D)(1), which pertains to domestic relations actions, provides that "findings of fact and conclusions of law are required on contested postjudgment motions to modify a final judgment or order[.]"

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. We decline to award taxable costs to either party under our discretionary authority set forth in MCR 7.219.

/s/ William B. Murphy

/s/ Mark J. Cavanagh

/s/ Cynthia Diane Stephens